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BEFORE THE FEDERAL ELECTION COMMISSION

SENSITIVE

In the Matter of)

MUR 6829)

Ron Johnson for Senate Inc.)

and James J. Malczewski as treasurer)

Senator Ronald H. Johnson)

Strategy PAC)

and James J. Malczewski as treasurer)

Wisconsin Institute for Law and Liberty)

DISMISSAL AND
CASE CLOSURE UNDER THE
ENFORCEMENT PRIORITY
SYSTEM

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GENERAL COUNSEL'S REPORT

Under the Enforcement Priority System, the Commission uses formal scoring criteria as a basis to allocate its resources and decide which matters to pursue. These criteria include, without limitation, an assessment of the following factors: (1) the gravity of the alleged violation, taking into account both the type of activity and the amount in violation; (2) the apparent impact the alleged violation may have had on the electoral process; (3) the complexity of the legal issues raised in the matter; and (4) recent trends in potential violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), and developments of the law. It is the Commission's policy that pursuing relatively low-rated matters on the Enforcement docket warrants the exercise of its prosecutorial discretion to dismiss cases under certain circumstances. The Office of General Counsel has scored MUR 6829 as a low-rated matter and determined that it should not be referred to the Alternative Dispute Resolution Office.

The Office of General Counsel recommends that the Commission dismiss the allegations that Respondents Ron Johnson for Senate Inc. and James J. Malczewski in his official capacity as treasurer (collectively the "Committee") violated the Act and Commission regulations by failing to disclose outstanding debt. Further, the Office of General Counsel recommends that the

1 Commission find no reason to believe that Senator Ronald H. Johnson ("Senator Johnson"),
2 Strategy PAC and James J. Malczewski in his official capacity as treasurer ("Strategy PAC"),
3 and Wisconsin Institute for Law and Liberty ("WILL") violated the Act and Commission
4 regulations in this matter.¹

5 Complainant Scot Ross ("Complainant"), Executive Director of One Wisconsin Now,
6 alleges that the Committee failed to timely disclose debts incurred for legal fees related to a suit²
7 filed by Senator Johnson against the Office of Personnel Management ("OPM") challenging an
8 agency ruling related to the Affordable Care Act.³ The Complainant also filed two addenda
9 related to the same issue.⁴ Compl. at 1. According to news articles submitted with the
10 complaint, Senator Johnson announced the lawsuit at a press conference on January 6, 2014, and
11 stated that legal fees for the suit would be paid to WILL, which was representing him in the suit,
12 from Committee funds. Compl. at 1-2; *see also id.*, Attach. at 1.

¹ The EPS rating information is as follows: Complaint Filed: May 22, 2014. Response from WILL Filed: June 17, 2014. Response from Strategy PAC Filed: June 18, 2014. Response from Senator Johnson and the Committee Filed: July 16, 2014. First Complaint Addendum Filed: July 14, 2014. Response from Senator Johnson and Committee Filed: August 15, 2014. Response from Strategy PAC Filed: August 18, 2014. Second Complaint Addendum Filed: November 24, 2014. Response from Johnson and Committee Filed: January 12, 2015.

² The Complainant does not allege a violation of 52 U.S.C. § 30114(b) ("personal use").

³ The U.S. District Court for the Eastern District of Wisconsin granted OPM's motion to dismiss the suit for lack of standing, and the Seventh Circuit Court of Appeals affirmed the lower court's decision. *Johnson v. U.S. Office of Personnel Management*, 2014 WL 1681691 (E.D. Wis. Apr. 28, 2014), *aff'd*, 783 F.3d 655 (7th Cir. 2015).

⁴ The first includes what appears to be a copy of WILL's 2013 tax return ("Form 990"). First Compl. Addendum at 4-6. WILL's Form 990 discloses \$10,770 in fees earned in 2013 in connection with Senator Johnson's lawsuit against OPM, although according to the Form 990, the fees were not collected until 2014. *Id.* at 5. In the second Addendum, the Complainant notes that the Committee's 2014 October Quarterly Report discloses a \$12,281.31 disbursement to WILL, and questions whether WILL was being paid the fair market value for services rendered in connection with an appeal it filed on September 1, 2014, in relation to the suit at issue. Second Compl. Addendum at 2. As the record reflects that the Committee ultimately paid WILL approximately \$84,626, *see n.7*, this Office does not address the allegation further.

1 A joint response filed by Senator Johnson and his Committee asserts that the Committee
2 was not required to report the legal fees because the debt was not incurred for an expenditure, as
3 defined by the Act and Commission regulations. Joint Resp. at 1-2. The Joint Response asserts
4 that expenditures are defined as payments made for the purpose of "influencing any election for
5 Federal office," *see* 11 C.F.R. § 100.111(a),⁵ and explains that, pursuant to the Commission's
6 guidance in Advisory Op. 1986-09 (Daniel)⁶ and 11 C.F.R. § 104.3(b)(2)(vi), the payments to
7 WILL were reported on Line 21 of the Detailed Summary Page for the Committee's 2014 July
8 Quarterly Report as "other disbursements."⁷ *Id.* According to the Joint Response, the invoice
9 was paid with Committee funds on June 11, 2014, within 28 days of receipt of the invoice, and
10 accurately reported within the July Quarterly reporting period. *Id.*

11 WILL's Response explains that in its agreement with the Committee, it provided an
12 estimate of legal fees and stated that WILL would not exceed the estimate without consulting
13 with the Committee. WILL Resp. WILL also states that it did not require a retainer from the
14 Committee and that its fees were based on negotiated hourly rates. *Id.* Both WILL and Strategy

⁵ As the Joint Response points out, Senator Johnson, who was elected to the Senate in 2010, was not on the ballot in 2014. *Id.* at 1. It is noted, however, on May 20, 2011, the Reports Analysis Division ("RAD") notified the Senator that his campaign committee appeared to have "received contributions and/or made expenditures in support of [his] 2016 candidacy in excess of \$5,000." RAD stated that Senator Johnson could disavow these activities on behalf of his 2016 candidacy by sending a written notification to RAD within 35 days, pursuant to 11 C.F.R. § 100.3(a). The Commission's website discloses no disavowal notice from Senator Johnson.

⁶ In Advisory Op. 1986-09, a member of Congress sought Commission guidance as to reimbursing himself with campaign funds for legal fees incurred in connection with an inquiry into his travel expenses by the House Committee on Standards of Official Conduct.

⁷ The Committee's 2014 July Quarterly Report, filed on July 14, 2014, discloses a payment to WILL of approximately \$41,413 on June 11, 2014. *Id.* at 319. In addition to the payment of approximately \$12,281 referenced above, *see* 2014 October Quarterly Report at 331, the Committee disclosed a payment of approximately \$26,325 on October 29, 2014, *see* 2014 Year End Report at 160, and \$4,607 on April 1, 2015, *see* amended 2015 April Quarterly Report at 1153, for a total of approximately \$84,626.

1 PAC requested that they be dismissed as respondents because they were not involved with the
2 lawsuit. *Id.*, Strategy PAC Resp.⁸

3 The Act and Commission regulations require political committees to continuously report
4 the amount and nature of their outstanding debts until those debts are extinguished. 52 U.S.C.
5 § 30104(b)(8); 11 C.F.R. §§ 104.3(d), 104.11(a)-(b). This reporting requirement applies to
6 "estimated debts." 11 C.F.R. § 104.11(b). Debts or obligations of \$500 or less "shall be
7 reported as of the time payment is made or not later than 60 days after such obligation is
8 incurred, whichever comes first." 11 C.F.R. § 104.11(b).⁹ Once the exact amount is determined,
9 the political committee shall either amend the report(s) containing the estimate or indicate the
10 correct amount on the report for the reporting period in which such amount is determined. *Id.*
11 Section 104.11(b) states that a "debt" includes "a written contract, written promise, or written
12 agreement to make an expenditure," but it does not exclude other types of Committee debts.
13 *Cf.* 11 C.F.R. § 116.10(a) (disputed debts must be reported when a creditor has provided
14 "something of value" to the political committee).

15 It appears that the Committee initiated an agreement for WILL's legal services as early as
16 2013, but failed to report these debts, or estimated debts, when incurred, despite the fact that
17 WILL reportedly provided the Committee with an estimate of expenses. The amount in
18 violation, however, does not warrant the additional use of Commission resources in this matter.
19 In fact, the approximately \$41,413 debt would not be referable under the applicable Reports
20 Analysis Division's thresholds to either ADRO or OGC. Therefore, we recommend that the

⁸ The Respondents replied to the Complaint Addenda by reiterating their earlier responses.

⁹ Debts or obligations over \$500 shall be disclosed "as of the date on which the debt or obligation is incurred," with the exception of recurring administrative expenses such as salary or rent, and if the exact amount is not known, the report shall state that the amount disclosed is an estimate. *Id.*

Commission exercise its prosecutorial discretion and dismiss the allegations as they pertain to Ron Johnson for Senate Inc. and James J. Malczewski in his official capacity as treasurer, pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985). Further, the Office of General Counsel recommends that the Commission remind Ron Johnson for Senate Inc. and James J. Malczewski in his official capacity as treasurer, of the obligation to report its debts when incurred, to continuously report the amount and nature of its outstanding debts until those debts are extinguished, and to amend its disclosure reports accordingly, pursuant to 52 U.S.C. § 30104(b)(8) and 11 C.F.R. §§ 104.3(d), 104.11, including "estimated debts," *see* 11 C.F.R. § 104.11(b). This Office also recommends that the Commission make no reason to believe findings as to Senator Ronald H. Johnson, Strategy PAC and James J. Malczewski in his official capacity as treasurer, and Wisconsin Institute for Law and Liberty, as there is no indication that they violated the Act and Commission regulations in this matter. Finally, we recommend that the Commission approve the attached Factual and Legal Analysis and the appropriate letters, and close the file.

RECOMMENDATIONS

1. Dismiss the allegations that Ron Johnson for Senate Inc. and James J. Malczewski in his official capacity as treasurer violated the Federal Election Campaign Act of 1971, as amended, and Commission regulations;
2. Remind Ron Johnson for Senate Inc. and James J. Malczewski in his official capacity as treasurer to report its debts when incurred, to continuously report the amount and nature of its outstanding debts until those debts are extinguished, and to amend its financial disclosure reports accordingly, pursuant to 52 U.S.C. § 30104(b)(8) and 11 C.F.R. §§ 104.3(d), 104.11, including "estimated debts," *see* 11 C.F.R. § 104.11(b);
3. Find no reason to believe that Senator Ronald H. Johnson violated the Federal Election Campaign Act of 1971, as amended, and Commission regulations;

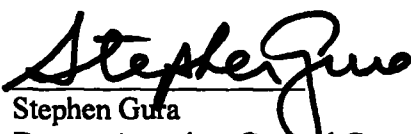
4. Find no reason to believe that Strategy PAC and James J. Malczewski in his official capacity as treasurer violated the Federal Election Campaign Act of 1971, as amended, and Commission regulations;
5. Find no reason to believe that Wisconsin Institute for Law and Liberty violated the Federal Election Campaign Act of 1971, as amended, and Commission regulations;
6. Approve the attached Factual and Legal Analysis and the appropriate letters; and
7. Close the file.

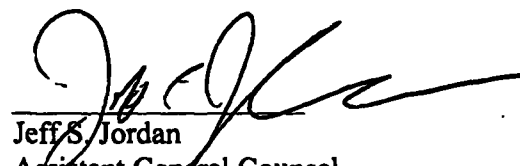
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